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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/062,974	01/31/2002	Massimiliano Antonio Poletto	12221-01101	2836
26161	7590	12/06/2005	EXAMINER	
FISH & RICHARDSON PC P.O. BOX 1022 MINNEAPOLIS, MN 55440-1022			WRIGHT, NORMAN M	
		ART UNIT	PAPER NUMBER	
		2134		
DATE MAILED: 12/06/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/062,974	POLETTO ET AL.
Examiner	Art Unit	
Norman M. Wright	2134	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 25 July 2005.

2a)  This action is **FINAL**.                            2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## **Disposition of Claims**

4)  Claim(s) 32 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-32 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All    b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

*D. M. Wright* 11/14/01  
**NORMAN M. WRIGHT**  
**PRIMARY EXAMINER**

**Attachment(s)**

1)  Notice of References Cited (PTO-892)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3)  Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 07/25/05.

4)  Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_ .

5)  Notice of Informal Patent Application (PTO-152)

6)  Other: \_\_\_\_ .

### ***Double Patenting***

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

9. Claims 1, 4, 8-10, 13, and 16, are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1, 3-4, 6-8, 12-15, 17, and 26-27 of copending Application No. US 2002/0035683 A1, hereinafter '683. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

10. Alternatively, claims 1, 4, 8-10, 13, and 16, are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1, 3-4, 6-8, 12-15, 17, and 26-27 of copending Application No. US 2002/0035683 A1, hereinafter '683. Although the conflicting claims are not identical, they are not patentably distinct from each other because, the monitoring devices and/or probe or plurality of probe devices are monitors that are statistical collectors in both applications. Similarly, the cluster heads are in fact the controllers/centers for the monitor/probes in both applications. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the invention of US application '683, by labeling the cluster heads as controllers/centers, and the probe devices/monitors as

statistical collectors/monitors as recited in the disclosure. One of ordinary skill in the art would have been motivated to perform such a modification because it involves only the aspect of labeling the functions of the device and not modifying its structure. One of ordinary skill in the art would have seen this as an obvious expedient to renaming the function of the device/apparatus/system, while retaining the original functions.

### ***Response to Arguments***

Applicant's arguments filed 7/25/05 have been fully considered but they are not persuasive. Applicant remarks that the prior arts fail to teach a number of features: such as a cluster head, links different network that is being monitored/victim center or networks, packets transmitted over links, and additionally the previously features of a monitoring device, a plurality of probes collecting statistical information from data packets on a network, cluster heads coupled to said probes, and determining whether there is a denial of service attack on the data center. The examiner does not concur; applicant is reminded that the cluster head to which he is purporting that there is a structural difference has been depicted as a black box of figure 3. It appears to be a programming element that is part of a gateway and performing data monitoring functions that a gateway performs. The distinction that applicant is purporting does not appear to exists. Additionally, distinctions of querying and pushing information to and from a cluster monitor is not recited in the claims, and is therefore moot whether or not the art teaches it. The aspects of a redundant network is also taught in the prior art, see your remarks on page 9, regarding the publications and its functionality. Likewise, the

probes being disposed to collect statistical information, is precisely the function that probes perform on data packets. The examiner would like to indicate that the two networks in which the inventions are to be used, '974 and the prior art are structurally the identical. Therefore, an identical device is inherently capable of performing the same functions, regardless of what the devices are labeled. See figures 1-3, 5-6 and par. 0020-21 et seq. of '880, and present disclosure '974. Additionally, the monitoring device of '974 (element 26) is a gateway, see also pg. 3, lines 20-21. Similarly, monitor of '880 is a gateway (element 26), and col. 2, par. 0022. The probes (26a-26n) of '974, which are a part of the gateway (26), perform the functions of sampling packets and collecting statistical information of packets (fig. 2, pg. 7, lines 10 et seq.); similarly, see '880 at col. 2, par. 0023. The clustered heads of '974 are connected to the probes (pg. 7, lines 2 et seq.), similarly, figs. 1-3, 6, and col. 2, par. 0030 et seq.. As to the remarks that the instant invention '974 and the prior art are germane to different inventions the examiner does not concur. Both the instant application and the prior art recites inventions that may be utilized in a distributed environment for the detection of a denial of service attack, see above.

### ***Conclusion***

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Norman M. Wright whose telephone number is (571) 272-3844. The examiner can normally be reached on weekdays, from 8AM to 4 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Greg Morse can be reached on (571) 272-3838. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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